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The noisy secrecy: Swiss banking law in international dispute

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Introduction

I did not choose the subject of this chapter just for its current relevance, but in an attempt to reflect a lesson which I learned from Detlev Vagts. I remember, among other lessons, a specific one in the context of the dispute regarding accounts of Holocaust victims held with Swiss banks.[1] He argued on pertinent issues of international law for the banks and showed how a jurist can be truly independent from all the semi-truths typically associated with that kind of case. Detlev Vagts can draw from his roots a rarely found ability to 'think international'. But there is more to it: he personifies the power of pure juridical argument over politics.

At the time of writing of this chapter addressing the subject of Swiss banks, the case pursued by the US Internal Revenue Service (IRS) against Union Bank of Switzerland (UBS), which presently is Switzerland's biggest bank, is in the process of settlement. But there is also pressure from the EU and the OECD, and litigation may continue in the United States. I will not describe all the ramifications of the UBS litigation, which of course are manifold. Instead, I will attempt to offer a bird's-eye view. I am confident that my observations will retain some of their relevance after the specific cases have been settled in one way or another.

Of course, the issues at stake, while being of eminent importance for Switzerland, are of rather remote concern in the United States, and only slightly more so in Switzerland's neighbouring countries. This evidently has to do with the difference in relative size of the matters, although a comparison with the epic battle between David and Goliath would be to overstate the matter. Modern Davids are usually not winners, because

[1] D. F. Vagts, 'Switzerland, International Law and World War II', *AJIL*, 91 (1997), 466–75.

they are Davids for the very reason of thinking too national and not having established reliable allies. The tremendous asymmetry in national impact is enhanced by a secondary effect, in that it heats up the *internal* political atmosphere and reawakens old antagonisms, which in turn complicates the negotiators' job.

I personally am fortunate to be a mere external observer. But I must confess that, when I heard US Senator Carl Levin state on Swiss radio that 'the Swiss hold out bank secrecy as a national value, in the same way the US prize freedom and democracy',[2] I felt hurt as a Swiss national. I do not think that by granting banking secrecy a country gives up its claim to be a free and democratic State. The opposite might be true, as I will try to show.

Senator Levin's statement also raises the issue of how to conduct this kind of dispute. Of course, the statement was addressed to a US Senate Subcommittee and not to the international community. However, it still reflects that kind of self-attribution of morality which tends to increase international barriers instead of removing them. But I am also convinced that Switzerland has in turn not done enough in this international dispute. As I also wish to show, things cannot continue in Switzerland as they used to. This is not just a matter of changing the law, but of better reflection on the arguments. My personal hope as a Swiss citizen is that the shock wave may not be too strong, but strong enough to bring about that change.

Secrecy, privacy, privilege, confidentiality

It should be understood, last but not least by my own compatriots, that there is no such thing as a bank secret. Any banker, including a Swiss banker, will naturally try to keep silent on certain matters; but he does so like any businessman in the world of any business branch would, just as they will in certain circumstances do the opposite when they think it desirable to inform people about certain facts. What is so special about banking secrecy that could justify particular legal provisions?

As Swiss bankers rightly insist, it is actually the *client's* secrecy that the banks are obliged to safeguard. In this sense, they speak of 'Bank-*Kunden*-Geheimnis'. But new questions arise. At the practical level, one

[2] Opening Statement of Senator Carl Levin, US Senate Permanent Subcommittee on Investigations, Hearing on Tax Haven Banks and US Tax Compliance: Obtaining the Names of US Clients with Swiss Accounts, 4 March 2009, www.levin.senate.gov/newsroom/release.cfm?id=309057.

question concerns the impression of a certain opportunism in applying the client's right. One example is the interbank credit rating system. Of course, feeding client information into these systems without asking the client for permission is often justifiable because of the client's presumable interest, but secrecy should mean that the client's actual wishes, rather than her presumable interests, govern.

On the level of *basics*, the question remains: what is so special about banks? Why not protect clients of other industries in the same way? Is the service of the store at the corner of the street selling me my daily bread in any sense less valuable than the services provided by bankers? To be sure, there is an important difference. Bread is for everyone; that I eat some of it regularly is nothing of interest. Money, on the other hand, is spread much more individually. News in that respect offers more information.

But questions remain nevertheless: is having money something private and therefore protected, and eating bread a fact belonging to the public domain? One could well reverse the statement: food is more private, more personal, compared with the extremely neutral medium of money. The play on the arguments can be continued endlessly.

Indeed, if one interviews some Swiss bankers or reads the experts' books, one will most certainly be told that the client's *privacy* is what it is all about. But they do not discuss the subject further, they do not ask what privacy exactly means, despite – or maybe because of – the intense struggle with other jurisdictions which has lasted for so many years already. The discussion has petrified, so to speak. The reaction to questions like those I raise above may even be 'No jokes on serious matters, please!' The Swiss, similar to the Americans in my view, are pragmatic people; their actions, particularly in the economic field, are not driven by the stars of a philosophical heaven, but by the immediate interests as they appear in clear daylight. But nowadays, in criminal, tax and other matters, a *conflict of values* has arisen.

Values are the most important rhetorical weapons, nationally and internationally, and for that the value concepts must be precise. That is their chance to survive against opposing values. I might put it in this way: not dollars but ideas, not daylight of regular business but the leading stars in the dark sky, and the actors should not be Herodes' killers but the three magical . . .

Privacy, however, is an ambiguous value. Almost everyone, in every situation, can pretend to it. Thus, it is a weak weapon. To state that privacy is the motive behind banking clients' protection is neither right nor wrong, since the question still is what lies behind all of this: why should we bother about privacy, and in what situations?

If one looks at the history of the banks' duty to keep their customers' data secret, one obtains the following hints: although practised already as long as banks exist, explicit wording was introduced into Swiss legislation by the Banking Act (*Bankengesetz*) of 1934,[3] in particular Art. 47. In a world in which money no longer should be kept under a private mattress, banks were considered as *confidents nécessaires* – i.e. as entities rendering services on which the public is depending and requiring individual information from the client. A line was drawn relative to the other, mostly classical professions placed under a similar regime: physicians, priests and ministers, lawyers and accountants. Specific motives were extended to banks, including, to give one example, the protection of the Jewish monies then flowing from Germany.

This special position of certain professions in the English vocabulary is usually denoted by the word *privilege*, thereby stressing its function in civil and criminal *procedure*. In the European Continental systems, however, the primary source is *substantive* criminal law. Thus, the feature distinguishing these professions is the penal *sanction* that is placed on transmitting information received through the client and/or the mandate. Art. 321 of the Swiss Criminal Code is the general source of professional secrecy, providing a list of the professions involved. The procedural privilege, which used to be a matter left to the Swiss Cantons, is sometimes tied to this provision (cf. on professional secrecy, p. 297).

The banker does not appear on this list. Banking secrecy has its systematic source in a special law, not in the provision on professional secrecy contained in the Swiss Criminal Code. The Banking Act was promulgated several years before the Criminal Code came into effect. These circumstances notwithstanding, Art. 47 of the Swiss Banking Act is so clearly moulded in the same fashion that the common origin is beyond doubt. Some differences do, however, exist. While they call for an explanation (see also p. 292), they do not alter the general idea.

Viewed in this light, the motive behind Art. 47 Banking Act is reasonably clear.[4] It is the insertion of the banker's activity into the list of

[3] *Bundesgesetz vom 8. November 1934 über die Banken und Sparkassen*, Systematic Collection of the Federal Laws (SR) 952.0.

[4] The wording is somewhat ambiguous in this respect. The Article fails to name the client as the holder/addressee of the right and, similar to Art. 321 of the Swiss Criminal Code regarding the professions covered there, it does not explicitly provide that the client can relieve the bank of its duty. Nevertheless, the provision is so construed. See G. Stratenwerth, 'Note 25 to Art. 47', in R. Watter, N. P. Vogt, Th. Bauer and Ch. Winzeler (eds.), *Basler Kommentar* (*BSK*) *zum Bankengesetz* (*BaG*) (Basel, Geneva and Munich: Helbing & Lichtenhahn, 2005), 690;

confidents nécessaires being criminally sanctioned for the breach of the banker's duty of confidentiality. It is not the banks' or bankers' secrecy, but bank*ing* secrecy: it is generated by the bank's *activity*.[5] In my view, this position taken by the Swiss legislator in 1934 cannot be called unreasonable or even arbitrary at the outset. Professional secrecy is called for when the services rendered are necessary and are of a complex nature, with the consequence that the client is obligated to confide a relatively large amount of information, since it is only the expert receiving the information who can assess its relevance. We can leave it to the individual taste if one prefers to speak in this context of the client's 'privacy'. Even then, the logic must be that privacy is at stake *because* confidentiality is granted, and not that it is granted because there is a case of privacy.

The State's authority to interfere with confidentiality

For many reasons, legitimacy may be claimed for an interest to find out what deposits a person holds at her bank and/or *where* the means originated from, or *who* has been paid from them, or *when* the debit and credit entries occurred.

Such interests may be those of *private* persons. Typical examples are those of creditors who need to assess whether to grant a credit or how good the credits are which they already granted. Another is the spouse or the heirs for whom the money available and debts outstanding may be of vital importance. In Switzerland, as elsewhere, there is a distinction between the time a holder is alive and the position of her heirs. During

M. Aubert, P.-A. Béguin, P. Bernasconi, J. Graziano-von Burg, R. Schwob and R. Treuillard (eds.), *Le secret bancaire suisse*, 3rd edn. (Berne: Stämpfli, 1995), 106 *et seq*. Moreover, §3 explicitly employs the term '*Berufsgeheimnis*' (professional secrecy), in parallel to Art. 321. Commentators also tend to support professional secrecy, although the lack of clarity illustrates that little attention is paid to this kind of 'philosophical' issue. E.g. B. Kleiner, R. Schwob and C. Winzeler (eds.), *Kommentar zum Bundesgesetz über die Banken und Sparkassen* (Zurich: Schulthess, 2006), Art. 47, n. 1, use the title '*Bankkundengeheimnis als Berufsgeheimnis*', but go on to say that the basis lies in Art. 13 of the Swiss Constitution, which protects individual privacy (n. 4) and the *Persönlichkeitsrecht* (right to personality, which in Switzerland is understood as the source of the right to privacy; Art. 28 Civil Code). Stratenwerth, 'Note', *supra*, Art. 47, n. 1 and P. Nobel, *Swiss Finance Law and International Standards* (Berne, The Hague and Boston: Stämpfli, Kluwer Law International, 2002), 890 *et seq*., §15, n. 83, point to a double root in contract law (Art. 398 Code of Obligations) and in the right to personality.

[5] Rightly, Nobel, *Swiss Finance Law and International Standards*, *supra* n. 4, heading preceding n. 77.

a person's lifetime, she may have multiple obligations to inform others on matters regarding her assets or debts, but her bank is no source of inquiry for those interested. The client's duty is not by itself a duty of all third parties who, like the banks, can contribute to its execution.[6] The situation becomes different, and varies among States, if requests by heirs, executors, etc. are presented to the bank after the holder's death.

The State also respects a person's control. To execute what it considers to be its claims, certain procedures involving the person must be followed; to cover a tax debt the fiscal authority may not just choose the property best suitable to the State and proceed to confiscate it. The same must be true when the State wants information. It must adhere to certain procedures. It is not that the State is barred from obtaining any specific information; the State always and everywhere can arrogate to itself the power of access. But the way chosen cannot be any one way leading to the goal. This means, among others, that the State's procuring of information must be *proportionate* – i.e. it must be the least intrusive way possible, taking into consideration the individual's protected values which are at stake.

Evidently, confidentiality concerns particular individuals. But it nevertheless concerns the State. The State cannot freely intervene in human interaction without losing its proper *raison d'être* of protecting the State's subjects, anywhere in the world.

In this sense it is, in my view, beyond doubt that individuals have a *right* to engage themselves in communication and thereby create obligations towards their partners, even though legal science and law so far have not tied this right to constitutional human rights in a coherent and uniform manner.[7] And communication necessarily means the possibility

[6] Cf., with regard to a spouse's right to information, Art. 170 §2 Civil Code, providing that in an intramarital information procedure the court itself may require a third party such as a bank to provide complementary information. There is no direct claim on the part of the plaintiff against the bank. The court thus is intercalated in order to harmonise best the interests involved. See V. Bräm and F. Hasenböhler, 'Art. 170 Civil Code', in P. Gauch and J. Schmid (eds.), *Kommentar zum schweizerischen Zivilgesetzbuch* (Zurich: Schulthess, 1997), Art. 170 Civil Code, n. 15, 452 *et seq.*; cf. C. Hegnauer and P. Breitschmid, *Grundriss des Eherechts*, 4th edn. (Berne: Stämpfli, 2000), n. 19.12, 199 *et seq.*; but see, for a more generous view, H. Hausheer, R. Reusser and Th. Geiser, *Berner Kommentar*, 2nd edn. (Berne: Stämpfli, 1999), Art. 170 Civil Code, n. 29, 438.

[7] Cf. J.N. Druey, 'Kommunikationsfreiheit – ein Programm', in B. Ehrenzeller, Ph. Mastronardi, R. Schaffhauser, R. J. Schweizer and K. A. Vallender (eds.), *Der Verfassungsstaat vor neuen Herausforderungen. Festschrift für Yvo Hangartner* (St Gallen: Dike Verlag, 1998), 523–36. The constitutional protection is clearer in Germany than in Switzerland; cf. with

of confidentiality. It is personal by its essence; it is always *addressed* to persons, usually to specific ones, but rarely to the public.[8] This fundamental proposition is evidenced when confidentiality is made the object of a *contract* – as is usually the case in the banking industry. Every legal system protects contracts, and attributing some value to them must have repercussions for the State's own conduct.

Thus, forcing a party to disregard confidentiality is *never* irrelevant. If the State disregards or disturbs confidentiality such action must be justified as an *exception*. This means the following:

- The exceptions, as they deny the expectations of those involved, must be based on a set of *general* rules, not just be a case-by-case pondering.
- The exceptions must be part of a *coherent system* in order to justify them.
- The exceptions must be proportionate to the goal pursued by the State.
- For any exceptions to be justifiable, they must be *particular* – i.e. they must be tied to specific informational needs.

Never is the State as such the purpose justifying an exception, nor are any of its agencies.

All of this has nothing to do with any special and one-sided rule of whatever kind concerning banking clients. Confidentiality in general is a constitutional value requiring self-restraint on the part of the State. In addition, then, the account of values must give room to the quality of the profession as *confident nécessaire*.

Art. 47 of the Swiss Banking Act

The basic first paragraph of Article 47 states in pertinent part:

> Who reveals a secret, which has been entrusted to him in his function as an . . . employee of a bank . . . or which he came to know in such function . . ., shall be punished by imprisonment of up to 6 months or a fine of up to CHF 50,000.

The Article goes on to state in §2 that negligence is also punishable, subject to a somewhat milder sanction. Art. 47, §3, provides that the

regard to the banking secret (which has no criminal relevance), J. Petersen, *Das Bankgeheimnis zwischen Individualschutz und Institutionenschutz* (Tübingen: Mohr, 2005), 26–8, following the tradition set by Canaris and Hopt; see also P. Wech, *Das Bankgeheimnis* (Berlin: Duncker & Humblot, 2009), 78–88, 147–55.

[8] Cf. J. N. Druey, *Information als Gegenstand des Rechts* (Zurich: Schulthess, 1995), 156–8 *et passim*.

Article also applies to acts committed after termination of the banking mandate.

These paragraphs are followed by a crucial final provision, §4. It reads as follows:

> The Federal and Cantonal provisions about the duty to testify and to disclose information against State agencies remain reserved.

What then is it about this Article that has caused such upheaval? '*Tant de bruit pour une omelette?*' Art. 47, §4, seems to carve out what appears in §1 to be the very essence of the Article and which has produced all the noise, namely, the information given to the *judicial and financial authorities*. How can a Swiss bank be held liable for breach of confidentiality by accepting a governmental request for information in the national interest, if the various branches of government can sweep Art. 47 away by rules proper to their respective purposes?

It is interesting to examine what the Swiss Confederation and the Cantons have done with their power in this respect. The procedures in the courts hitherto were vested in the Cantonal jurisdictions, where one rarely finds an explicit mention of the banks in the rules pertaining to professional privileges. However, those rules often simply refer to the respective provisions in criminal law. Whether these references include Art. 47, and whether they *can* include it, is uncertain.[9] As a whole, the impression is that there is not much eagerness among Cantonal legislators to give the banks procedural privileges. This is confirmed by the harmonised civil and criminal procedures for the whole country implemented in 2007–8.[10]

For one thing, banking does not enjoy the same tradition-born prestige as do the 'classical' professional privileges. Furthermore, banking appears as another kind of activity than those 'classical' ones. The

[9] The predominant view is that in civil procedure banking secrecy is included in general legal references like 'professional secrecy', but only if it is preponderant compared with the truth-finding interest in the case (see also *infra* n. 10), whereas in criminal procedure banking is entirely excluded as a privilege. See Aubert *et al.* (eds.), *Le secret bancaire Suisse*, *supra* n. 4, 135–9 and 147–9; G. Piquerez, *Traité de procédure pénale suisse*, 2nd edn. (Zurich: Schulthess, 2006), n. 778.

[10] *Schweizerische Strafprozessordnung*, 5 October 2007, Art. 173 §2, and similarly *Schweizerische Zivilprozessordnung*, 19 December 2008, Art. 166 §§1–2: an absolute privilege is granted only to the traditional professions, whereas bankers (and other legally protected professions – e.g. auditors) are subject to a weighing of interests. The burden of showing a predominant secrecy interest is placed on the bank.

physician and attorney especially represent the medieval discipline of the liberal arts, whereas a bank is not constituted by the capacities of any particular physical person, but is an organisation.[11] To introduce the banks into the civil procedure laws would, therefore, have triggered quite some debate and pressure on the part of other organisations.

But all of this is not incompatible with the concept of *confident nécessaire* contained in Art. 47 of the Swiss Banking Act. Indeed, the differences in content between that provision and the general criminal provision regarding professional secrecy in Art. 321 of the Swiss Criminal Code are not essential and they are directed to reinforcing the banking client's position.[12] Thus, our intermediary conclusion is that the function of banking secrecy as a privilege in court is well conceivable from its nature as a professional secrecy, albeit that political debate on the subject was avoided and the issue remained somewhat in the background. The procedural privilege is not where the stress of Art. 47 lies, which in comparison to the United States might be due to the lack of a procedure regarding discovery.

The position of the tax authorities

Leaving aside procedural privileges, let us return to our main theme and examine the other loophole left by Art. 47, §4 – namely, the power of agencies within the *government* to request information from the banks. In so doing, I will narrow my focus on one of the main segments, namely, the *tax authorities*. That must mean, primarily, the *Swiss* authorities. The space granted to them in the national context determines the possibilities of *international cooperation*, which hardly can go beyond the power allowed against nationals.[13] This deserves a heading of its own not only because it is presently the source of most debate, but because it puts

[11] One Swiss Court has held that the absence of a reference to banks in Art. 321 of the Criminal Code shows that 'the legislator chose those professions which, contrary to the bankers, wear in our society an aura of wisdom, replacing the priests and magicians of primitive times' (Bezirksgericht Affoltern, judgment of 14 March 1989, *SJZ*, 45 (1989), 252) (trans. by the author).

[12] The Banking Act is more far-reaching, not only in that it also includes mere negligence but it drops the requirement contained in Art. 321 that prosecution is to be requested by the client. Thus, enforcement is initiated *ex officio* by the State attorney. The idea behind this provision is that clients abroad might learn about the disclosure only after the time limit for the request of prosecution had expired.

[13] This restriction is, however, no longer accepted by the OECD. Cf. also *infra* n. 15.

the spotlight back on Art. 47. Our findings will be that tax law does not exhaust the discretion granted, but rather professional secrecy and procurement of tax-relevant information live together in a kind of symbiosis based on mutual respect.

The basic observation is the following: tax law does not break the client–bank confidentiality tie.[14] But of course the treasury department does not simply trust the taxpayers' tax returns, and hence it applies a withholding tax at the source of income from securities that will be accounted for in the final assessment of the tax duty based on the return. Besides this regular feature, which is applicable to the tax duties of *physical* persons,[15] there is the exceptional frontal attack on banking confidentiality in specific contexts of *prosecution*, criminal or administrative, in the event that there are sufficient grounds for suspicion of the respective behaviour.

At the *international* level, a considerable network of double taxation and mutual assistance treaties governs this matter, providing specific degrees of informational cooperation of the Swiss authorities and to some extent involving the banks directly.[16] For the investor subject to a tax jurisdiction other than Switzerland, the withholding tax is lost unless she can avail herself of a double taxation treaty.

Considering this primarily national system, the question thus arises again: '*Tant de bruit pour une omelette*?' How can confidentiality be praised as a value when the State forces people to disclosure by subjecting them to a heavy burden if they do *not* disclose? Is it not sanctifying a mere formality when the State restrains itself from addressing the bank directly? The 35 per cent rate of withholding tax for many Swiss is higher than their tax duty on the respective assets; secrecy then becomes a costly luxury instead of a human right. And for those subject to a higher tax

[14] *Bundesgesetz über die direkte Bundessteuer DBG, Systematische Sammlung des Bundesrechts*, SR 642.21, Art. 127 §2.

[15] Companies are subject to a stricter regime. Cf. P. Locher, *Einführung in das internationale Steuerrecht der Schweiz*, 3rd edn. (Berne: Stämpfli, 2005), 531.

[16] The Swiss Federal Court has subjected banking secrecy to a weighing of interests featuring an international scope and has declared that there may be a preponderant interest of the Confederation to cooperate with other countries (concerning bribery prosecution in Italy; *Amtliche Sammlung der Bundesgerichtsentscheide 1997* (123), II 160). I consider this case to be very important. It brings an international scope directly into the weighing procedure instead of determining how far national restrictions of confidentiality can be extended to international cooperation of States. The statement, often heard these days, that banking secrecy 'remains intact' is thereby abolished at the international level. At the constitutional level, it raises the question whether a court has the power to decide matters of international policy.

charge, the motive of tax evasion in making use of banking confidentiality is clear enough and thereby abusive.

Herein lies the source of a basic misunderstanding leading friends as well as foes of banking confidentiality to reach exaggerated conclusions. Any right to cut off any flow of information, be it labelled secrecy, privacy, confidentiality, or whatever, is a right to *dispose*, a 'privilege' in the sense used by Hohfeld;[17] the holder of the right has his hand on the switch, so to speak. This particular right belongs to the category of rights such as ownership or the right to enter into contracts or of voting in an assembly, and it is opposed to the rights to *enjoy*, which are characterised by a specific interest, like receiving piano lessons or a neighbour's forbearance from raising swine.[18]

A person accused of a crime might consider that the better tactic is to answer the prosecution's questions. If she remains silent nevertheless and does not follow the direction desired by the State attorney, that is her choice. Her right is not to suffer any disadvantage from her silence, *but to determine her interests by her proper autonomy*. Thus, the withholding tax is not by itself an intrusion into the protected sphere. However, it would be questionable if the rate would be set at a level *excluding* the silence *as a conceivable option*. The rate of 35 per cent also seems to be guided by the intention of a certain neutrality considering the great variety of situations as part of an overall assessment.[19]

In similar vein, it is wrong to criticise confidentiality because it helps taxpayers to evade taxes or furthers other kinds of misuse. *Abusus non tollit usum*: so long as there are cases where secrecy does not cover unlawful practices, it retains its legitimacy despite the remaining possibility of abuse. If tax avoidance rather than evasion is the motive, if tactical advantages of hiding clues to an adversary are at stake, if a son losing all his money in the casino should not be aware of the actual fortune of his father, or if simply a stingy man wants to look poor – such aims are sometimes lawful, and sometimes not, but it cannot be the sense of confidentiality that those interests are evaluated on a case-by-case

[17] W. Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Juridic Reasoning* (Aldershot: Ashgate, 2001), *passim*.

[18] The distinction has already been alluded to with respect to the limits of case-by-case weighing of interests, *supra* n. 2. Cf. Druey, *Information als Gegenstand des Rechts*, *supra* n. 8, 206–9.

[19] See M. Beusch, 'Art. 13, n. 2', in M. Zweifel, P. Athanas and M. Bauer-Balmelli (eds.), *Kommentar zum schweizerischen Steuerrecht*, 2 vols. (Basel: Helbing & Lichtenhahn, 2005), vol. II/2, 416 *et seq.* (considering economic interests only).

basis. Confidentiality has its ground in the mere contact with certain persons, not in the particularities of the information received. The justification also is given – I would say, all the more so – when the intentions of the client are unclear to herself at that moment.

The limit of this argument is reached where abuse is dominant or even usual. Given the popularity of Swiss banking secrecy as a means of tax evasion, the Swiss banks have the burden of proof in this respect, politically or even legally.

Conclusion: an omelette is of value everywhere

Our elementary view on the matter is sufficient to draw a conclusion that in turn is elementary. The banking confidentiality as a self-restraint on the part of the State has its basis not in the famous Art. 47 of the Swiss Banking Act, but in the law and practice of the various branches of government. This confirms formally what we had observed when looking at the values involved: confidentiality is an element inherent in all human interaction and a value as such. Art. 47 enters the scene through its determination of the banker as a *confident nécessaire*. It works as a further consideration limiting the State's breaking through confidentiality.

This does not in any way mean that the State must protect confidentiality in an absolute manner, but rather that it is under a duty to safeguard confidentiality whenever it is reasonably possible. The more frontal the attack, the stronger must be the power of this argument. Whether or not investigations are limited to prosecuting tax fraud or also include all or certain types of tax evasion is, under the auspices of banking confidentiality, an important but by no means essential difference. The answer is crucially different if automatic access is to be granted to the fiscal authorities. Such a grant flies in the face of the idea of confidentiality, reaching far beyond banks, banking law provisions and money. In a constitutional State, no citizen has to accept having a microphone attached to her conveying to the listeners whatever she says. And every citizen may choose her partner, and also select a bank of her choice.

The pressure that has been applied to Swiss bank confidentiality has, oddly enough, stirred movements in both directions. On the one hand, progressive politicians argue for the complete *abolition* of the concept. One conservative party proposes, on the other hand, to *reinforce* it by inserting the concept of bank confidentiality into the Swiss Federal Constitution. My answer here is simple: both are right. But both of

them need not battle for their positions, because essentially things already are as they wish them to be. If Switzerland were to get rid of Art. 47 of the Banking Act, the situation would not change the State's rights and the level of its international cooperation. In this sense, Art. 47 has no content of its own. But it expresses a constitutional principle. The very core of banking confidentiality, as applied to the State (or to any State), being proportionality and rule-guidance when breaking up confidential relations, finds its origin in the Constitution.

Both movements risk overshooting their goal. This would be the case if the abolition is combined with new State powers directed toward totalitarian information links between the banks and the State. And this would also be the case if a constitutional amendment in an isolated way deals with banks only, and does not address the issue of confidentiality in a broader way.

At the *international* level, the discussion about *values* should be considerably widened and intensified. This is a task primarily incumbent upon Switzerland. But the result, in my view, must be that the basis of freedom and democracy, claimed for the United States by Senator Levin and in fact common to many States, also sets common ground to the value of communication and thereby of confidentiality. Differences in where the stress is placed certainly remain; still, the comparison cannot but bring about convergence.[20]

In this process, the concept of 'bank secrecy' must shed its reputation as a purely Swiss concept and a tax haven specialty, but must not be repelled as such. To the contrary, it should be discovered in every nation based on a free and democratic constitution. Therefore, it should not be an object of competition between States or a source of exploiting national differences. Politically, this is to say that there is no point in fighting over banking secrecy, *no matter whether it is a fight for or against it* – subject to two conditions: first, that both sides recognise what their constitution is saying, and secondly, that they be transparent *vis-à-vis* each other. The right, anyway, is merely formal – it represents a protection of the individual autonomy and, at the international level, of the sovereignty of States, and a warranty of procedures only, not of secrecy. In this sense, the right is as thin as an omelette. But many people in many countries like omelettes.

[20] See in this sense the very elaborate comparison of French, Luxemburg and Swiss law by Jérôme Lasserre Capdeville, *Le secret bancaire. Étude de droit comparé* (Aix-Marseille: Presses Universitaires d'Aix-Marseille, 2006), vol. 2, nn. 1062–74, 782–800.